Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1075

STAR FISH & OYSTER COMPANY, INC.
and the F/V DELL G,

Petitioners,

v.

LINDA LAVERN CLABORN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No.

STAR FISH & OYSTER COMPANY, INC.
and the F/V DELL G,

Petitioners,

v.

LINDA LAVERN CLABORN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioners Star Fish & Oyster Company, Inc. and the F/V Dell G respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on August 22, 1978.

I

OPINION BELOW

The opinion of the Court of Appeals is *Claborn v. Star Fish & Oyster Co., Inc.*, 578 F.2d 983 (5th Cir. 1978) and appears in the Appendix hereto. The case being tried to a jury, no opinion was rendered by the District Court for the Southern District of Alabama, Southern Division.

II

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on August 22, 1978. A timely petition for rehearing was denied on October 6, 1978, and this petition for certiorari was filed within 90 days of that date. This court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

III

QUESTIONS PRESENTED

1. Whether a court may properly refuse to submit the issue of seaworthiness to the jury and hold as a matter of law that a seaman's presence aboard renders a vessel unseaworthy in light of *Boudoin v. Lykes Brothers Steamship Company.*

2. Whether the proper standard for reviewing the sufficiency of the evidence supporting a jury verdict on the question of unseaworthiness, where the issue is coupled with a Jones Act claim, is that set out by *Lavender v. Kurn* or by *Boeing Company v. Shipman.*

IV

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment VII, United States Constitution: Civil Trials

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

V

STATEMENT OF THE CASE

The jurisdiction of the District Court was invoked under 46 U.S.C., §688 et seq. and the General Maritime Law of the United States. The plaintiff in this proceeding, and the respondent herein, also alleged diversity of citizenship and claimed damages exceeding $10,000.00.

This case arose out of a fatal stabbing aboard the F/V Dell G, a vessel owned by Star Fish and Oyster Company (Star). Bobby McCollough and the deceased Johnny Claborn, were both crew members aboard the F/V Dell G which left the port of Mobile on a fishing trip some six days prior to the stabbing.

The record reflects that McCollough had been drinking prior to embarking on this voyage. By way of deposition, the captain of the vessel testified that although there was liquor brought aboard the boat by the crew, it had been consumed on the first day before the vessel left Mobile Bay. There was testimony that a bottle of whiskey was consumed by members of the crew, including McCollough, while the boat was underway but this occurred some "two or three or four days" before the fatal incident. R.96. McCollough was given a single cup of wine on the day of the fatal accident. R.151.

Two days prior to the fatal accident, there was an altercation between Claborn, McCollough and a seaman named Browning. McCollough, according to the testimony of Browning, spoke to Claborn accusing him of talking about him. After the accusation directed at Claborn, McCollough reached for, but did not grab, a bait knife.

The day before Claborn's death, McCollough experienced convulsions and, on orders from the captain, was handcuffed to a rail on the stern of the vessel for his own safety. At 11 o'clock on the night before the stabbing, McCollough appeared in good shape, according to the First Mate, was released, and stood a three hour wheel watch.

The fatal incident occurred in the wheelhouse of the vessel at approximately 7:30 on the night following McCollough's release. The wheelhouse of the Dell G was a compact, utilitarian structure containing a steering wheel and a cot along the back wall, and was flanked by four feet of working deck on either side.

Prior to the fatal incident, McCollough had stood watch from 3:00 to 6:00 P.M. Upon being relieved from his watch at 6 P.M. McCollough went forward and sat on a hatch cover. Claborn then entered the wheelhouse at 7:20 P.M. and stood with his back to the wheelhouse door. McCollough got off the forward hatch, walked aft until he stood behind Claborn. McCollough called Claborn by name. Claborn turned around and faced McCollough. Claborn yelled that McCollough had a knife and then threw up both of his hands. Claborn, apparently in panic, then turned attempting to run.

Claborn received a fatal wound to his back and died within a matter of minutes. Another crewmember,

while struggling with McCollough, was cut in the neck, although that crewmember did not recall how or when he was cut. McCollough was finally subdued by the crew, was handcuffed, and was turned over to authorities when the boat returned to Mobile.

Not much is known about Claborn and McCollough. This was the first trip aboard a Star vessel for both of these men. There was testimony to indicate that these two were friends, that they had shipped on at least one other vessel together, and that they had come to the Star dock together.

Respondent-plaintiff, Linda Lavern Claborn, brought the instant action in the United States District Court for the Southern District of Alabama, Southern Division as the personal representative of Johnny Claborn, claiming that the death of her husband was the result of negligence on the part of Star, and of unseaworthiness on the part of the F/V Dell G. Star demanded a trial by jury. The case came to be heard before a jury and motion for directed verdict filed by Claborn at the conclusion of all evidence was denied by the court. The jury returned a verdict for Star. A motion for Judgment Notwithstanding The Verdict and In The Alternative A Motion For A New Trial filed by the plaintiff was denied by the District Court.

The jury verdict in favor of Star was reversed by the Court of Appeals. The Fifth Circuit held that the facts of the case demonstrated that the Dell G was unseaworthy as a matter of law and that it was improper for the trial court to submit the issue to the jury. A timely petition for rehearing was denied on October 6, 1978.

VI

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts with the Decisions of Other Courts of Appeals as to the Proper Criteria to be Applied in Determining Whether a Seaman is "Defective" so as to Render a Vessel Unseaworthy and Misapplies the Supreme Court's Decision in *Boudoin v. Lykes Brothers Steamship Company.*

In *Boudoin v. Lykes Brothers Steamship Company*, 348 U.S. 336, 75 S.Ct. 382, 99 L.Ed. 354 (1955) this court established that the presence on board of a seaman who was "not equal in disposition to the ordinary men of that calling" might render a vessel unseaworthy. 348 U.S. at 340. The Supreme Court in *Boudoin* found that where a seaman had been drinking, attacked plaintiff with a bottle while plaintiff was in bed, and then returned with a large knife intending to use this weapon on plaintiff also, plaintiff had adduced sufficient evidence to warrant submitting the cause of action for breach of the warranty of seaworthiness to the trier of fact. *Boudoin*, unlike the instant case, did not hold that unseaworthiness existed as a matter of law; rather it merely held that a question of fact was presented.

Since *Boudoin,* conflicts have arisen between the various circuits as to the proper criteria to apply in reviewing cases where the alleged unseaworthiness was a defective seaman. The Fifth Circuit places much emphasis on the rank aboard ship of the assailant. In cases in which the assailant holds a position of

authority, a much higher standard of seaworthiness is applied. *Robinson v. S. S. Atlantic Starling*, 369 F.2d 69 (5th Cir. 1966) cert. denied, 386 U.S. 993, 87 S.Ct. 1309, 18 L.Ed. 2d 339 (1967); *Clevenger v. Star Fish and Oyster Company*, 325 F.2d 397 (5th Cir. 1963). The United States Court of Appeals for the Sixth Circuit, however, takes a different position. In *Harbin v. Interlake Steamship Company*, 570 F.2d 99 (6th Cir.) cert. denied, 98 S.Ct. 3091 (1978), the court held that ". . . . The fact that one of the seamen in the present case was a petty officer does not, in our judgment, call for the application of a different rule." 570 F.2d at 105.

Similarly, the Circuit Courts have issued conflicting opinions as to whether the savageness of an attack by one seaman on another can in itself be sufficient to demonstrate unseaworthiness, or, whether a showing of vicious propensity or nature by prior acts or history is also necessary. The Second Circuit in *Walters v. Moore-McCormack Lines, Inc.*, 309 F.2d 191 (1962) specifically noted that even in assault cases involving a dangerous weapon, most courts required additional evidence of a background of character traits or personality disorders from which a jury could properly find that the assailant was possessed of a vicious character. The court, however, specifically withheld opinion on whether the viciousness of the attack itself could suffice to demonstrate unseaworthiness.

In *Boorus v. West Coast Trans-Oceanic Steamship Line*, 299 F.2d 893 (1962), the Ninth Circuit indicated that without some showing of evil disposition, propensity to bad conduct, previous fights or fisticuffs, or preexisting disposition towards any of these things, a holding of unseaworthiness would be improper. The

Sixth Circuit addressed the question more directly. "As the Supreme Court held in *Boudoin*, it is the 'disposition' of the assailant, rather than simply the severity of the act, that is material to the issue of unseaworthiness." *Harbin v. Interlake Steamship Company, supra*, at 103.

The Fifth Circuit has issued conflicting opinions on this question. In *Clevenger, supra*, the court takes the position that the savageness of the assault with a dangerous weapon can be sufficient proof of unseaworthiness in and of itself. 325 F.2d at 402. (*Clevenger*, it should be noted, unlike the instant case, was tried without a jury.) This squarely conflicts with the language, albeit dictum, of *Holmes v. Mississippi Shipping Company*, 301 F.2d 474 (5th Cir.) appeal dismissed, 371 U.S. 802, 83 S.Ct. 13, 9 L.Ed. 2d 46 (1962). In *Holmes*, a seaman had a sudden acute schizophrenic reaction and amputated his own hand with three blows from a meat cleaver. Although the court held that a seaman could not recover where the unseaworthy condition was the seaman himself, the court noted that there was nothing in the record to indicate that prior to the sudden and unexpected onset of the mental illness, the seaman had a wicked disposition, a propensity to evil conduct, or a savage and vicious nature. "We think it is quite doubtful if the facts of this case would satisfy the tests adverted to by the Supreme Court in *Boudoin* even if, as prayed by the appellant, we should hold that the ship's liability would be the same when Holmes assaulted himself as it would have been if he had assaulted another member of the crew and inflicted the same injury." 301 F.2d at 478.

In the case before this court, the record is devoid of

any showing of vicious propensity or savage disposition prior to the erratic behavior of the assailant seaman while aboard the vessel. Like its prior decision in *Clevenger, supra*, the Fifth Circuit's opinion below seems to be grounded in the nature of the assault and not on the character or disposition of the assailant.

The opinion below also squarely conflicts with the holding of *Boudoin, supra*. In *Boudoin*, in spite of a vicious attack by a drunken seaman, coupled with threatening and erratic behavior following the attack, the court merely held that the issue of unseaworthiness was one for the trier of fact. The Supreme Court did not hold that the assailant was a defective seaman, and thus constituted an unseaworthy condition, as a matter of law. Rather, the court reversed the Court of Appeals and upheld the prior determination of the trier of fact.

This Court has never held that a seaman is defective and hence constitutes an unseaworthy condition as a matter of law. However, in so holding, the *Claborn* court creates an additional conflict between the Circuits.

In *Gerald v. United States Lines Company*, 368 F.2d 343 (1966), the Second Circuit held:

> "In no case has this court held that an assault with a weapon establishes as a matter of law that the attacker is not equal in disposition to other men in the calling. Such evidence, even when coupled with proof of prior vicious conduct, creates a question of fact concerning the assailant's disposition for the jury to resolve." (citations omitted) 368 F.2d at 345.

The Court of Appeals' usurpation of the role of the jury would also seem to violate the Constitutional mandate

that ". . . the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." Amendment VII, United States Constitution.

This court has not addressed the question of a defective seaman since its decision in *Boudoin*. The conflicting case law among the different Courts of Appeals subsequent to *Boudoin*, as well as the Fifth Circuit's erroneous intrusion into the realm of the jury by holding that unseaworthiness exists as a matter of law justify the grant of certiorari to review the judgment below.

2. The Decision Below Erroneously Applies a Standard for Reviewing the Sufficiency of the Evidence Supporting a Jury Verdict Which is in Conflict with the Supreme Court's Decision in *Lavender v. Kurn*.

The court below found that the evidence was insufficient to warrant its submission to a jury. Based on this holding, the court found that it was error for the trial judge to submit the issue of unseaworthiness to the jury and reversed the jury's verdict in favor of the defendant.

The Supreme Court spoke to the question of sufficiency of the evidence in *Lavender v. Kurn*, 327 U.S. 645, 66 S.Ct. 740, 90 L.Ed. 916 (1946). The case involved a jury verdict for the plaintiff in an action under the Federal Employers' Liability Act. In that case, the court set up the following standard for measuring the sufficiency of the evidence:

> "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear." 327 U.S. at 653.

In *Rogers v. Missouri Pacific Railroad Company*, 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed.2d 493 (1957) this court further delineated the proper measure of review as follows:

> "Under this statute the test of a jury case is simply whether the proofs justify, with reason, the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." 352 U.S. at 506.

The *Lavender-Rogers* standard has been adopted in review of cases involving Jones Act negligence. *McBride v. Loffland Brothers Company*, 422 F.2d 363 (5th Cir. 1970); *Barboza v. Texaco, Inc.*, 434 F.2d 121 (5th Cir. 1970). When an unseaworthiness claim is combined with a Jones Act claim, all issues, including the unseaworthiness claim which ordinarily does not carry with it the right of trial by jury, should be tried by a jury when so demanded. *Fitzgerald v. United States Lines*, 374 U.S. 16, 83 S.Ct. 1646, 10 L.Ed.2d 720 (1963).

In cases where an appellate court is asked to review the findings of a jury where unseaworthiness has been

joined as a cause of action with Jones Act negligence, then this same *Lavender-Rogers* standard has been applied. *Michalic v. Cleveland Tankers, Inc.*, 364 U.S. 325, 81 S.Ct. 6, 5 L.Ed.2d 20 (1960); *Sentilles v. Inter-Caribbean Shipping Corporation*, 361 U.S. 107, 80 S.Ct. 173, 4 L.Ed.2d 142 (1959). The Fifth Circuit itself recognized that *Lavender*, *supra*, set out the proper standard for testing the sufficiency of a jury determination in a case involving both Jones Act negligence and unseaworthiness. *Rabb v. Canal Barge Company*, 428 F.2d 201 (5th Cir. 1970). In *Manchack v. S.S. Overseas Progress*, 524 F.2d 918 (5th Cir. 1975), that court stated:

> "Manchack invites us to reverse the judgment as being clearly erroneous. This, of course, is not the proper standard to be applied in attacking a jury verdict. Where, as here, there is an evidentiary basis for the jury's verdict, this court's function is exhausted, and Manchack is not free to relitigate the factual dispute. *Lavender v. Kurn*, 1946, 327 U.S. 645, 66 S.Ct. 740, 90 L Ed. 916." 524 F.2d at 919.

Rather than following its prior decisions and the decisions of this court, the Fifth Circuit applied a different standard for testing the sufficiency of the evidence in support of the jury verdict below. The court applied the standard set out in *Boeing Company v. Shipman*, 411 F.2d 365 (5th Cir. 1969):

> "If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper." 411 F.2d at 374.

Boeing, *supra*, was a non-maritime diversity action

in which the court specifically rejected the *Lavender-Rogers* standard, holding that the standard is peculiar to FELA (Jones Act) trials and not applicable in diversity jury cases.

In recent decisions, the *Boeing* "reasonable men" standard has found its way into the review of maritime cases in which Jones Act and unseaworthiness claims are joined, challenging the Supreme Court's own standard as set out by *Lavender* and *Rogers*. The Second Circuit, for example, has in at least one case, applied a standard combining the holdings of both *Lavender* and *Boeing*. *Armstrong v. Commerce Tankers Corporation*, 423 F.2d 957 (2d Cir. 1970). The Fifth Circuit, in defiance of its own adherence to the *Lavender* standard in *Rabb*, *supra*, and *Manchack*, *supra*, has now expressly sanctioned the application of the *Boeing* rationale to the review of maritime injury cases based on unseaworthiness as well as Jones Act negligence. *Litherland v. Petrolane Off-Shore Construction Services, Inc.*, 546 F.2d 129 (5th Cir. 1977); *Robertson v. Douglas Steamship Company*, 510 F.2d 829 (5th Cir. 1975); *Claborn v. Star Fish and Oyster Company*, 578 F.2d 983 (5th Cir. 1978)

VII

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully Submitted,

BY: /s/ Robert H. Smith
ROBERT HERSCHEL SMITH

BY: /s/ Lawrence Wettermark
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205-476-4493

Counsel for Petitioners

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
OF ALABAMA, SOUTHERN DIVISION

LINDA LAVERN CLABORN, as
Personal Representative of
JOHNNY Z. CLABORN, Deceased,

Plaintiff,

vs. CIVIL ACTION NO. 74-333-T

STAR FISH & OYSTER CO., INC.,
a corporation, and the
F/V DELL G.,

Defendants.

On this 15th day of June, 1976 into open court comes the Plaintiff by and through her attorneys, the Honorable Richard F. Pate and the Honorable J. Cecil Gardner, and the Defendant by and through its attorney, the Honorable Robert H. Smith. And also comes the Petit Jury, who were duly empaneled and sworn according to law, with two alternates, and the trial of the case is resumed.

Motion to Amend her Complaint, filed by Plaintiff on this date, is DENIED.

Motion for Directed Verdict, filed by defendant Star Fish & Oyster Company, Inc., at the conclusion of the plaintiff's evidence on June 14, 1976 is now RE-FILED at the conclusion of all the evidence, and DENIED by the Court.

Motion for Directed Verdict, with Additions, filed on this date by defendant Star Fish & Oyster Company, Inc., is DENIED by the Court.

Arguments of counsel to the Jury are now heard, and the Court charges the Jury. At 11:05 A.M. the Jury retires to consider its verdict.

Now comes the Jury, who, having heard the evidence, the arguments and the Court's charge, upon their oaths do say:

"We, the Jury, find for the defendants, STAR FISH & OYSTER CO., INC., a corporation, and the F/V DELL G.

Norma James
Foreman."

It is therefore ORDERED and ADJUDGED by the Court that Plaintiff shall take nothing, and a judgment is entered in favor of the defendants, STAR FISH & OYSTER CO., INC., a corporation, and the F/V DELL G.

Costs of court are taxed against the Plaintiff.

Done at Mobile, Alabama this the 15th day of June, 1976.

/s/ Daniel H. Thomas
Senior United States District Judge

U.S. DISTRICT COURT

SOU. DIST. ALA.
FILED AND ENTERED THIS THE
15TH DAY OF JUNE, 1976
MINUTE ENTRY NO. 41054
WILLIAM J. O'CONNOR, CLERK,
BY— /s/ Illegible
Deputy Clerk.

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 76-3710

D.C. Docket No. CA 74-333-T

LINDA LAVERN CLABORN, as personal representative of JOHNNY Z. CLABORN, deceased,
Plaintiff-Appellant,

versus

STAR FISH & OYSTER CO., INC., a corporation, ET AL.,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA

Before COLEMAN, AINSWORTH and VANCE, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and this cause be, and the

same is hereby remanded to the said District Court in accordance with the opinion of this Court.

AUGUST 22, 1978

U.S. DISTRICT COURT
SOU. DIST. ALA.
FILED IN CLERK'S OFFICE
OCT 20 1978
WILLIAM J. O'CONNOR
Clerk

ISSUED AS MANDATE:
OCT 18 1978

A true copy
Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit
By Brenda Hauck
Deputy
New Orleans, Louisiana
OCT 18 1978

Linda Lavern CLABORN, as Personal Representative of Johnny Z. Claborn, Deceased, Plaintiff-Appellant,

v.

STAR FISH & OYSTER COMPANY, INC., a corporation, et al., Defendants-Appellees.

No. 76-3710.

United States Court of Appeals, Fifth Circuit.

Aug. 22, 1978.

Rehearing Denied Oct. 6, 1978.

Widow of deckhand, who was stabbed to death by another crewman during fishing voyage, claimed entitlement to recover damages for negligence under Jones Act and for unseaworthiness under general maritime law. The United States District Court for the Southern District of Alabama, Daniel Holcombe Thomas, J., entered judgment in favor of defendants, and widow appealed. The Court of Appeals, Ainsworth, Circuit Judge, held that where crewman had been drinking for several days, had gone nearly a week without sleep, had previously grabbed for bait knife with apparent intent to stab victim, and had exhibited other delirious symptoms so that fellow crewmen had handcuffed him to stern of vessel and where assault upon victim was unprovoked, sudden, extraordinarily savage, and fatal, crewman was not equal in disposition to ordinary seaman and his presence aboard vessel made vessel unseaworthy as a matter of law.

Reversed and remanded.

1. Shipping 84(3)

An especially dangerous seaman can cause a vessel to be unseaworthy.

2. Shipping 84(3)

Seaman can cause vessel to be unseaworthy if dangerous character of seaman is such that he is not equal in disposition to ordinary man of that calling.

3. Shipping 84(3)

Shipowner's lack of knowledge of seaman's "defect" or dangerous condition which renders vessel unseaworthy is not an adequate defense.

4. Shipping 84(3)

For purposes of determining whether character of seaman renders vessel unseaworthy, command position of seaman implies higher standard of conduct.

5. Shipping 84(3)

Where crewman had been drinking for several days, had gone nearly a week without sleep, had previously grabbed for bait knife with apparent intent to stab victim, and had exhibited other delirious symptoms so that his fellow crewmen had handcuffed him to stern of vessel and where crewman's fatal assault upon victim with ten-inch bait knife was unprovoked, sudden and extraordinarily savage, crewman was not equal in disposition to ordinary seaman and his presence aboard vessel made vessel "unseaworthy" as a matter of law for purposes of victim's widow's suit, in which widow sought to recover damages for unseaworthiness under general maritime law.

See publication Words and Phrases for other judicial constructions and definitions.

Richard F. Pate, Mobile, Ala., for plaintiff-appellant.

Robert H. Smith, Mobile, Ala., for defendants-appellees.

Appeal from the United States District Court for the Southern District of Alabama.

Before COLEMAN, AINSWORTH and VANCE, Circuit Judges.

AINSWORTH, Circuit Judge:

Linda Lavern Claborn brought this action to recover for the death of her husband, Johnny Z. Claborn, a deckhand on defendant's vessel the Dell G, who was stabbed to death by another crewman on September 15, 1973, during a fishing voyage off the Yucatan peninsula of Mexico. Plaintiff claims entitlement to recover damages for negligence under the Jones Act, 46 U.S.C. §688, and for unseaworthiness under general maritime law. The district court denied plaintiff's motion for a directed verdict, and the jury found for defendant. Plaintiff's motions for a new trial and for judgment notwithstanding the verdict were also denied, and she appealed. Finding that plaintiff has demonstrated unseaworthiness of the vessel as a matter of law, we reverse and remand for a determination of the appropriate damages.

The critical facts of this case are not in dispute. The Dell G left Mobile, Alabama on Tuesday, September 11, 1973. On board were the captain, Richard Kingsley, the first mate, James Browning, the cook, Atlee Stephenson, deckhands Bobby McCollough and Johnny Claborn, and several other crewmen. The

depositions of Kingsley, Browning and Stephenson were received and read at trial. Browning stated that he and McCollough had been drinking during the four days before the vessel's departure. Captain Kingsley admitted that he brought six bottles of wine and two bottles of whiskey on board for the crew's consumption during the voyage. It was also sworn that McCollough brought an additional fifth of whiskey on board.

The crew drank the six bottles of wine and one of the fifths of whiskey before the vessel left Mobile Bay. Thus, the only whiskey remaining on board was one bottle set aside by the captain for medicinal purposes and the fifth brought on by McCollough. The captain gave the "medicinal" fifth to the cook, who shared the bottle with Browning and McCollough, apparently at one sitting. McCollough's fifth was drunk after the vessel left Mobile Bay. Browning testified that he "sat and fed [the bottle of whiskey] to [McCollough]." Stephenson stated that he thought all the alcohol had been consumed by Thursday morning. Browning claimed that McCollough did not sleep during the voyage.

McCollough's drinking and his failure to sleep eventually took their toll. According to the captain, McCollough had to be handcuffed to the stern of the vessel on Friday evening.[1] Kingsley testified that McCollough was tied up for his own safety, because it was feared that he might fall overboard during an alcoholic convulsion. Kingsley insisted that Mc-

[1]Browning stated that McCullough was tied to the stern on Thursday afternoon and released on Thursday evening, in contrast to the captain's testimony that McCullough was tied up on Friday evening and released on Saturday morning.

Collough did not behave in a violent manner while handcuffed to the stern, and that he had not heard of any threats made by McCollough. The first mate stated that McCollough was tied to the stern because he had been "[t]alking out of his head like he was going into the monkeys," and because McCollough had previously grabbed for a bait knife as if he was about to attack Claborn.[2] The captain admitted that he gave McCullough a half cup of wine while he was handcuffed to the stern, in order to relieve his shaking. McCollough had been released by Saturday morning, and took the wheel watch between 3 and 6 p.m. on Saturday. The first mate relieved McCollough at 6 p.m., and testified

[2]Browning's testimony was as follows:

"Q Before the day of the stabbing, had McCullough been chained and handcuffed?
"A Yes.
"Q What was he eating?
"A He was eating beans.
"Q With his hands?
"A With his hands and he was shaking, you know.
"Q His hands were shaking real bad?
"A Yes, he was watching the hatch cover up there. I am sitting opposite of him. Claborn and Bobby Dean was sitting side by side. Well, I cut this onion up and I laid the bait knife on the table. I said Bobby, go ahead and eat. He kept watching and kept watching. He said, see, they are talking about me now. Claborn spoke up, he said you know that Ted and I are your friend. He said we are not going to fuss with you. He said you are one of them. He reached and grabbed the bait knife.
"Q He was talking about—to Claborn then?
"A Yes, I put my hand on the knife. He didn't get it.
"Q Then, McCullough reached for the knife right when he was saying that?
"A He said you are one of them.
"Q Then, you got the knife and didn't let him have it?
"A He didn't get it then."

that at 7:20 p.m.[3] Claborn was standing next to him in the wheelhouse, and McCollough was sitting on the forward hatch. McCollough got up, walked back to the wheelhouse, and called for Claborn. Claborn turned around to face McCollough, cried out that McCollough had a knife, turned away and attempted to run. McCollough then stabbed Claborn in the back with a ten-inch bait knife. McCollough and Browning struggled, and Browning was cut in the neck. The cook and the captain finally subdued McCollough, and tied him to the mast. Claborn expired within minutes. Captain Kingsley stated that McCollough was delirious during the time he was chained to the mast.[4]

[3]The cook testified that the stabbing occurred at 6:40 p.m., and the captain estimated that the incident took place between 6 and 7 p.m.

[4]"Q What did you do with . . . McCollough, after you got the knife away from him?
"A We put the handcuffs on him.
"Q Then what did you do with him?
"A We took him out of the wheelhouse and tied him to the mast or the pin rail one.
"Q Chained him to the rail?
"A Yes, fastened him there. Because he was struggling then, trying—even with the handcuffs on trying to get into the gurry pin (?) to get something out to fight with.
"Q He was trying to get another weapon?
"A Right.
"Q Was he still struggling and fighting after you had him cuffed?
"A Right.
"Q How about after you got him chained to the mast?
"A He was still hollering and struggling all night long that night and the next night. I guess—well, until we got into Isla Mujeres.
"Q Is Isla Mujeres in Mexico?
"A Yes, it is an island, there.
"Q Was he still screaming and yelling?
"A Yes.
"Q Was he still delirious?

(continued)

[1-3] The crucial issue in this case is whether the Dell G was unseaworthy as a matter of law during the voyage. It is well settled that an especially dangerous seaman can cause a vessel to be unseaworthy. *See, e.g., Boudoin v. Lykes Bros. Steamship Co.,* 348 U.S. 336, 339, 75 S.Ct. 382, 384, 99 L.Ed. 354 (1955). *See generally* Benbow, *Seaworthiness & Seamen,* 9 Miami L.Q. 418, 425-26 (1955); Gilmore & Black, The Law of Admiralty, 398-400 (2d ed. 1975); Norris, The Law of Maritime Personal Injuries §308 (3d ed. 1975). As this court stated in *Clevenger v. Star Fish & Oyster Co.,* 5 Cir., 1963, 325 F.2d 397, 399: "[a] seaman . . . who may be properly characterized as 'defective', because he fails to measure up to the standards of his calling, renders a ship as unseaworthy as a defective winch." The dangerous character of the seaman must be such that he is not equal in disposition to the ordinary men of that calling. *See Boudoin v. Lykes Bros. Steamship Co.,* 348 U.S. 336, 340, 75 S.Ct. 382, 385, 99 L.Ed. 354 (1955); *Keen v. Overseas Tankship Corp.,* 2 Cir., 1952, 194 F.2d 515, 518. The shipowner's lack of knowledge of a seaman's "defect" or dangerous condition is not an adequate defense. *See Clevenger v. Star Fish & Oyster Co.,* 5 Cir., 1963, 325 F.2d 397, 400. Thus, our role in reviewing this case is to determine whether, as a matter of law, McCollough failed to measure up to the standards of his calling.

(footnote continued from preceding page)

"A I don't know whether it was delirium or incoherent talking, but, all kind of crazy things. I mean, all disconnected.
"Q Did he appear to be in the DT's?
"A I am not a doctor, I don't know what he was in.
"Q It was just wild . . .
"A Just wild, beserk."

In *Clevenger v. Star Fish & Oyster Co., supra,* we reversed the district court's decision in favor of the shipowner under the following circumstances. While unloading the catch, the first mate and libellant had "exchanged seamen's unpleasantries," *id.* at 398, and the first mate "without word or warning" stabbed Clevenger in the back with a "devil's fork," a four-foot-long ice chisel. *Id.* The district court had found that no unseaworthiness had been shown because the incident occurred during unloading rather than during the navigation or operation of the vessel, that the crew members were working as joint venturers, and that there was no evidence of negligence in the selection of the crew. We held that the district judge applied erroneous criteria in determining seaworthiness, and that the distinction between joint venturers and seamen was not relevant to the question of liability for unseaworthiness.

In *Clevenger* the court examined the standard of unseaworthiness caused by dangerous crewmen set forth in *Boudoin v. Lykes Bros. Steamship Co.,* 348 U.S. 336, 75 S.Ct. 382, 99 L.Ed. 354 (1955).[5] After canvassing the cases implementing the *Boudoin* standard, the court concluded that

[5]In *Boudoin* the Supreme Court declared that:

> [i]f the seaman has a savage and vicious nature, then the ship becomes a perilous place. A vessel bursting at the seams might well be a safer place than one with a homicidal maniac as a crew member.
>
> We do not intimate that [the assailant] is a maniac or that that extreme need be reached before liability for unseaworthiness arises.

348 U.S. 336, 340, 75 S.Ct. 382, 385.

> [w]e extract from the cases the principle that in itself a savage assault with a meat cleaver or similarly dangerous weapon can be sufficient proof that the attacker is "not equal in disposition and seamanship to the ordinary men in the calling." Drunkenness and bellicosity are additional factors to consider when the nature of the assault is inconclusive evidence of the attacker's fitness in terms of his calling. *Id.* at 402.

Although the *Clevenger* decision stated that the issue of the fitness of the seaman was usually a question for the trier of fact, the court nevertheless squarely held that unseaworthiness had been demonstrated as a matter of law. Emphasis was placed by the court on the special savagery of the assault and the fact that the assailant was the commanding officer at the time the stabbing occurred.

In *Robinson v. S.S. Atlantic Starling,* 5 Cir., 1966, 369 F.2d 69, *cert. denied,* 386 U.S. 993, 87 S.Ct. 1309, 18 L.Ed.2d 339 (1967), this court applied the *Clevenger* principles to another shipboard stabbing. After extended mistreatment by the captain, the officers' messman stabbed him in the abdomen. The district court, sitting without a jury, concluded that the captain's abuse of the messman had precipitated the assault, and that the messman " 'was equal in disposition and seamanship to the ordinary men in the calling.' " *Id.* at 71. This court affirmed the district court's decision. *Clevenger* was not found controlling, and was distinguished as involving the application of erroneous criteria by the district court, an assault "of a much more shocking nature," no provocation, and an attack by a superior officer.

[4,5] The present case is clearly distinguishable from *Robinson,* and well within the rationale of *Clevenger.*

Here, the sudden attack with a ten-inch, very sharp bait knife was savage, and without warning or provocation. In contrast, the assault in *Robinson* did not demonstrate that the attacker was not equal in disposition and temperament to the ordinary sailor, largely because the abusive and tyrannical conduct of the victim provoked the stabbing. Nevertheless, the present case is unlike *Clevenger* in that it is not claimed that the district court applied erroneous criteria when it presented the issue of unseaworthiness to the jury, and further that the assailant was not in a position of command. These distinctions are without significant weight. First, the court in *Clevenger* did not only find that the district court applied erroneous criteria for unseaworthiness, but also held that under the facts of that case unseaworthiness was demonstrated as a matter of law. We agree with the reasoning in *Clevenger* that the command position of a seaman implies a higher standard of conduct. Nevertheless, even the lowest standards of ordinary seamen were not met by the assailant in this case. McCollough had been drinking for several days, had gone nearly a week without sleep, had previously grabbed for a bait knife with the apparent intent to stab Claborn, and had exhibited other delirious symptoms so that his fellow crewman handcuffed him to the stern of the vessel. After stabbing Claborn, McCollough became "[j]ust wild, beserk." This was not an ordinary sailors' brawl.[6]

[6]The Supreme Court in *Boudoin* recognized that shipowners are not "liable every time a seaman gets drunk and does damage to a member of the crew." Rather, "[t]he problem . . . is one of degree. Was the assault within the usual and customary standards of the calling? Or is it a case of a seaman with a wicked disposition, a propensity to evil conduct, a savage and vicious nature?" 348 U.S. at 339-40, 75 S.Ct. at 384-85. See also, Norris, The Law of Maritime Personal Injuries §308, p. 27 (3d ed. 1975).

On the contrary, the assault was unprovoked, sudden, extraordinarily savage, and fatal. We conclude that McCollough was not equal in disposition to the ordinary seaman, and that his presence aboard the Dell G made the vessel unseaworthy. Therefore, the district court should have granted plaintiff's motion for a directed verdict, since "the facts and inferences point so strongly and overwhelmingly in favor of [plaintiff] . . . that reasonable men could not arrive at a contrary verdict." *Boeing Company v. Shipman,* 5 Cir., 1969, 411 F.2d 365, 374.

As we have found for the plaintiff on the issue of unseaworthiness, we need not consider the question of maritime negligence, *see Boudoin v. Lykes Bros. Steamship Co.,* 348 U.S. 336, 340, 75 S.Ct. 382, 385, 99 L.Ed. 354 (1955); *Clevenger v. Star Fish & Oyster Co.,* 5 Cir., 1963, 325 F.2d 397, 402.

REVERSED AND REMANDED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No.

COURT OF A...
FILED
OCT 6 1978
...ED W. WADSWOR...

LINDA LAVERN CLABORN, as
Personal Representative of
JOHNNY Z. CLABORN, Deceased,
Plaintiff-Appellant,

versus

STAR FISH & OYSTER CO., INC. a
corporation, ET AL.,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF ALABAMA

ON PETITION FOR REHEARING
(October 6, 1978)

Before COLEMAN AINSWORTH and VANCE,
Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:
/s/ Robert A. Ainsworth
UNITED STATES
CIRCUIT JUDGE